IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12073 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VALABHAI HARIBHAI GADHVI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 12073 of 2001

MS SUBHADRA G PATEL for Petitioner No. 1

MR SS PATEL, AGP, for Respondents No. 1-3

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 06/02/2002

ORAL JUDGEMENT

1. District Magistrate, Kutch, at Bhuj, passed an order on the 2nd September, 1999, in exercise of powers under Section 3(1) of the Gujarat Prevention of Anti-Social Activities Act, 1985 ("PASA Act" for short), detaining the petitioner under the provisions of the said

Act. However, the order came to be executed only on the 14th October, 2001.

2. The detaining authority took into consideration eight offences registered against the petitioner, so also the statements of five anonymous witnesses. The detaining authority considered the activities of the detenu as that of a bootlegger and observed that the petitioner is required to be immediately prevented from pursuing his activities, which are detrimental to public order. The detaining authority exercised powers under Section 9(2) of the PASA Act after recording a satisfaction that the fear expressed by the witnesses qua the detenu is genuine. The authority also considered the possibility of resorting to less drastic remedies and came to conclusion that detention under PASA Act is the only remedy that can be resorted to.

3. The petitioner challenges the order of detention on various grounds. Ms. Patel, learned advocate appearing for the petitioner, has restricted her arguments to the ground that there is improper exercise of powers under Section 9(2) of the PASA Act. She submitted that the statements of anonymous witnesses were verified by the Dy.S.P. and not by the detaining authority. There is total lack of material to indicate that the detaining authority had undertaken the exercise of verifying the genuineness of the fear expressed by the witnesses and the need for maintaining anonymity regarding identity of the witnesses. She submitted that, in light of the decision rendered by a Division Bench of this Court in Kajalben G. Sindhi v. Commissioner of Police, 2000(2) GLR 1296, mere statement by the detaining authority in the affidavit-in-reply that he was subjective satisfied will not be sufficient. There has to be contemporaneous material to indicate the exercise undertaken by the detaining authority.

3.1 She submitted that the order which was passed on September 2, 1999 was executed only on the 14th October, 2001, i.e. almost two years after the passing of the order. The delay in executing the order has affected the the very purpose of immediately preventing the petitioner from pursuing his illegal activities. She submitted that the petition may, therefore, be allowed.

4. Mr. Patel, learned Assistant Government Pleader, has opposed this petition.

5. Having regard to rival side contentions, it has to be stated, at the outset, that there is no material to

indicate that the detaining authority had undertaken any exercise to satisfy himself about the correctness and genuineness of the fear expressed by the witnesses. In the instant case, the statements were verified by the Dy.S.P. and not by the detaining authority. The detaining authority has to take into consideration the background, the antecedents, the character, etc. of the detenu while considering the need for exercise of powers under Section 9(2) of the PASA Act. The authority has to scale the right of the detenu of making an effective representation on the one hand and the public interest on the other and has to strike a balance between the two. There is no contemporaneous material to indicate undertaking of such exercise by the detaining authority and, therefore, the exercise of powers under Section 9(2) of the PASA Act can be taken to have vitiated. The detaining authority has to carefully examine that the alleged apprehension is not imaginary or fanciful or that it is not merely an empty excuse invented by the informant. No reliance, therefore, can be placed on these statements for sustaining the order of detention. There is improper exercise of powers under Section 9(2), as there is no material to indicate the exercise as stated above.

5.1 In this regard, decision in the case of Bai Amina v. State of Gujarat & Ors., 1981 GLR 1186 which later on came to be confirmed by a Full Bench of this Court in Chandrakant N. Patel v. State of Gujarat 1994(1) GLR 761 and Kajalben G. Sindhi v. Commissioner of Police 2000(2) GLR 1296 may be employed in service wherein the above principles have been laid down. Mere say in the affidavit-in-reply filed by the detaining authority that it was subjectively satisfied about the need will not suffice. There has to be contemporaneous record with regard to formation of such opinion or satisfaction regarding withholding of names and material particulars by the detaining authority. In the instant case, nothing is stated in the grounds of detention. The satisfaction recorded by the authority in exercise of powers under Section 9(2) of the PASA Act would, therefore, result into infringement of right of the detenu envisaged under Article 22(5) of the Constitution of India, which would vitiate the detention.

6. It may also be noted that the order which was passed on September 2, 1999 was executed only on October 14, 2001, i.e. almost twol years after the passing of the order. This delay itself will prove to be fatal to the detention, as during this time, undisputedly, no steps were taken for issuance of proclamation as

absconder. This is stated by the learned Additional Public Prosecutor by referring to the file of the Government on basis of a communication received by the Government from the District Magistrate on 21.12.2001. The petition, therefore, deserves to be allowed.

7. In the result, the petition is allowed. The impugned order of detention dated the 2nd September, 1999, passed against the detenu is hereby quashed. The detenu-Valabha Haribha Gadhvi is ordered to be set at liberty forthwith, if not required in any other matter. Rule is made absolute with no orders as to costs.

8. Direct service is permitted.

[A.L. DAVE, J.]

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